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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

SALOMON LOPEZ,

Defendant and Appellant.

G056258

(Super. Ct. No. 13CF0606)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Affirmed.

George L. Schraer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Charles C. Ragland and James M. Toohey, Deputy Attorneys General, for Plaintiff and Respondent.

Salomon Lopez appeals from a judgment after a jury convicted him of special circumstance first degree murder and street terrorism and found true enhancements. Lopez argues insufficient evidence supports the gang special circumstance and street terrorism substantive offense because there was no evidence he was an active participant in a criminal street gang. We disagree and affirm the judgment.

FACTS

I. Substantive

One day in February 2013, Julio Sanchez and Lopez picked up Vicente Vega in a van and drove to a medical marijuana dispensary. Sanchez drove while Vega sat in the passenger seat and Lopez, who wore a brown shirt and brown shoes, sat in the back. After Vega purchased marijuana, Sanchez drove them towards Vega's house.

As Sanchez passed an alley, Lopez said there were some "cats" or "fools" in the alley. There were three men standing in the alley. Sanchez responded, "Nah, nah, that's cool." Lopez told Sanchez to turn the van around. Sanchez drove around the block and turned into the alley.

As Sanchez entered the alley, Lopez said, "Let me get it." Sanchez pulled a gun from his waistband and gave it to Lopez. Sanchez said, "Don't let them have it." Lopez said, "Yeah, yeah, don't trip."

Sanchez stopped the van next to the three men, Joseph C., Alec B., and Jose O., and Lopez opened the sliding door. Lopez asked, "Where are you guys from?" Joseph and Alec displayed gang hand signs, and Joseph said, "Southside." Lopez stated, "This is F-Troop."

Thirty-two-year-old Lopez stepped out of the van, made an F-Troop gang hand sign with his left hand, and fired the gun twice with his right hand. Lopez shot Joseph in the chest; he died. Lopez shot Alec in the stomach; he survived. Jose escaped unscathed.

Lopez entered the van, closed the door, and told Sanchez to drive to a nearby cul-de-sac where Lopez told him to stop. They got out of the van, and Lopez returned the gun to Sanchez. A day or two later, Sanchez gave a bag to Vega and told him to keep it without telling him the bag's contents. In his bedroom, Vega looked in the bag and saw the gun. A few hours later, Sanchez retrieved the bag.

Days later, police arrested Vega and interviewed him. Because Vega was more scared of Lopez than Sanchez, he initially switched their roles in the incident. The police told Vega that he was not being truthful. Vega later said Lopez was the shooter and Sanchez was the driver. Later, police officers arrested Lopez and searched his home.

II. Procedural

An information charged Lopez with first degree murder (Pen. Code, § 187, subd. (a), all further statutory references are to the Penal Code) (count 1), and street terrorism (§ 186.22, subd. (a)) (count 2). As to count 1, the information alleged Lopez committed the murder for a criminal street gang purpose (§ 190.2, subd. (a)(22)), committed the murder for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)), and was a principal who discharged a firearm for the benefit of a criminal street gang (§ 12022.53, subs. (d), (e)(1)).

At trial, Vega stated he decided to testify in exchange for a reduced sentence. He, along with Alec and Jose, testified concerning the facts of the shooting. Vega additionally testified he first saw Lopez, who was with Sanchez and others, about a week before the shooting at El Salvador Park (Park), F-Troop claimed territory, and heard someone call Lopez "Thumper." He added F-Troop gang members congregated at the handball courts and people using the Park would avoid that area. He believed Sanchez was a F-Troop gang member because he associated with F-Troop gang members and talked about them, and had a moniker, "Animal." He believed Lopez was a F-Troop gang member because on the day of the shooting he wore F-Troop's color, brown, and

had a shaved head. On cross-examination, Vega stated he saw Sanchez with Lopez at the Park's handball courts.

The prosecution offered Sergeant Daniel Park's (Sergeant) testimony. Sergeant testified concerning a January 2012 incident where he attempted to perform a traffic stop of a truck. The truck's driver failed to stop, and a chase ensued. After the driver slowed the truck, he and the passenger got out of the moving truck and ran. Officers caught the driver, Lopez, and the passenger. In the driver's side door panel, officers found numerous compact discs, some of which had "F-Troop" written on them and others had "Delhi" written on them.

The prosecution offered the testimony of Detective Matthew McLeod, a gang expert. During McLeod's testimony, the parties stipulated F-Troop was a criminal street gang (gang) as defined by section 186.22. After detailing his background, training, and experience, McLeod testified concerning the culture and habits of traditional territory based Hispanic gangs. He stated that claiming a gang meant to express allegiance to a gang verbally, with hand signs, by wearing clothing, or having tattoos. He said gang members have monikers, pseudonyms within the gang used in part to avoid law enforcement detection. He explained asking where someone was from was a "hit up," a challenge to determine a person's gang allegiance that would likely result in violence and perhaps a homicide. He added gang members earn respect by committing violent acts and committing murder during a "hit up" garners the most respect for the gang member and the gang. He stated a "gang gun" is cherished within the gang and gang members use the gun to commit crimes and pass to other gang members to use. He said gang members know who has the gun. He explained Hispanic street gangs are territorial, meaning they claim a particular geographic area and they control that area, and hierarchal meaning they have chain of command. He stated gangs have allies and rivals.

McLeod testified he was familiar with F-Troop through extensive investigations of its members, speaking to them about their commission of crimes, and

patrolling its claimed territory. He stated the gang's color was brown and it had a hand sign, which he demonstrated. After describing F-Troop's claimed territory, he said F-Troop controls the Park, including the handball courts, and F-Troop gang members congregate there. He agreed people not associated with F-Troop would avoid the handball courts. He opined one of F-Troop's main rivals was "Barrio Southside Santa Ana" (BSSA). When the prosecutor asked what he would expect to happen if a F-Troop gang member "hit up" a Southside gang member, McLeod answered, a "violent confrontation."

McLeod testified he was the lead investigator for this case. He stated the shooting occurred in F-Troop claimed territory. He opined that at the time of the shooting, Lopez was an active participant and member of the F-Troop. He based his opinion both on his investigation of this case and the January 2012 incident. He also opined Vega and Sanchez were active participants of F-Troop at the time of the shooting. He said shooting and killing someone during a "hit up" increases the gang member's and gang's respect.

On cross-examination, McLeod testified Joseph was a member of "Southside Brown Demons" and Alec was a member of "Southside Blue Devils." Although those were different gangs with no relationship to BSSA, he agreed merely hearing "Southside" could have triggered Lopez's violent response.

Defense counsel asked McLeod about his opinion Lopez was an active participant in F-Troop at the time of the shooting. He stated a field interview (FI) card records an officer's contact with an individual and a street terrorism and prevention (STEP) notice informs an individual he is associating with a gang. He agreed Lopez did not have any FI cards or STEP notices. He also agreed Lopez did not have any gang-related tattoos. When asked, he admitted that until this case he had never heard of Lopez, or a "Thumper" from F-Troop, and police gang records did not mention him. When asked, he agreed that at the time of his *arrest* at home, Lopez was not wearing

brown, did not possess any gang indicia, and was not with F-Troop members or associates. He did not know how Lopez joined F-Troop. When asked, he agreed most Santa Ana gang members were “mid[-]teens[] to early [20s][.]” Finally, defense counsel questioned him about the January 2012 incident and whether he processed the CDs to determine who touched them. McLeod did not.

Lopez offered the testimony of Sanchez’s wife (Wife). Wife testified she previously dated Joseph and Sanchez would become angry at the mention of Joseph’s name. Lopez also offered a psychologist’s testimony concerning identifications.

The jury convicted Lopez of both counts and found the special circumstance and enhancements true. The trial court sentenced Lopez to life without the possibility of parole on count 1, and 25 years to life for the firearm allegation. The court imposed and stayed the sentence on count 2 (§ 654), and did not impose sentence on the street terrorism enhancement (§ 12022.53, subd. (e)(2)).

DISCUSSION

The issue on appeal is whether Lopez was an active participant in F-Troop pursuant to section 190.2, subdivision (a)(22), and section 186.22, subdivision (a). Section 190.2, subdivision (a)(22), provides for imposition of death or life in prison without parole where “[t]he defendant intentionally killed the victim *while* the defendant was an *active participant* in a criminal street gang, as defined in subdivision (f) of [s]ection 186.22, and the murder was carried out to further the activities of the criminal street gang.” (Italics added.) Section 186.22, subdivision (a), prohibits “active[] participat[ion] in any criminal street gang with knowledge that its members engage in, or have engaged in, a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.”

“[A] person ‘actively participates in any criminal street gang,’ within the meaning of section 186.22[, subdivision] (a), by ‘involvement with a criminal street gang that is more than nominal or passive.’ [Citation.]” (*People v. Castenada* (2000))

23 Cal.4th 743, 752 (*Castaneda*); see § 186.22, subd. (i).) In *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1509 (*Garcia*), another panel of this court cited *Castaneda* and stated the following: “It is not enough that a defendant have actively participated in a criminal street gang at any point in time, however. A defendant’s active participation must be shown at or reasonably near the time of the crime.”

Focusing primarily on section 190.2, subdivision (a)(22)’s use of the word “while” and to a lesser extent section 186.22, subdivision (a), Lopez asserts those sections require the defendant to be an active participant “immediately *prior* to” or “at the moment before” the crime occurred. In his reply brief, Lopez clarifies, “[E]vidence independent of the circumstances of the charged offenses must establish that the defendant is an active participant in a criminal street gang, and that the circumstances of the offense cannot be the basis for this finding or form any part of it.” Lopez contends there are two aspects to this issue, statutory construction, which we review *de novo*, and the quantum of evidence, which we review for sufficiency of the evidence.

“To assess the evidence’s sufficiency, we review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] ‘Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]’ [Citation.]

A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support”’ the jury’s verdict. [Citation.]” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357 (*Zamudio*).)

Here, there was sufficient evidence Lopez was an active participant of F-Troop both before and at the time he shot Joseph and Alec. McLeod opined Lopez was an active participant of F-Troop on the day he committed the homicide based on his review of documents and interviews of individuals associated with the case and the January 2012 incident. Contrary to Lopez’s claim his opinion was not supported by identifiable facts, McLeod testified he was responsible for the investigation of the case.

The facts of the shooting support McLeod’s opinion. When Sanchez picked him up, Vega saw Lopez was wearing a brown shirt and brown shoes, F-Troop colors. This was not long before Lopez saw the three men in the alley in F-Troop claimed territory. After Lopez ordered Sanchez to turn the van around to enter the alley, Lopez told Sanchez to give him the gun. Both McLeod and Vega believed Sanchez was also an F-Troop gang member. McLeod testified each gang member knows who has the gang gun. The evidence established that after Lopez “hit up” the three men and heard someone say Southside, the name of F-Troop’s rival, Lopez said, “This is F-Troop” and displayed the F-Troop hand sign with one hand while firing the gun with his other hand. After Sanchez drove away, Lopez returned the gun to him. From this evidence the jury could reasonably conclude immediately prior to the shooting Lopez had current knowledge Sanchez possessed the F-Troop gun and he engaged in a gang hit up to control his gang’s claimed territory, and thus he was an active participant in F-Troop reasonably near the time of the shooting.

Additional evidence corroborated the conclusion Lopez was an active participant of F-Troop. Vega testified a week before the shooting he saw Lopez, whose moniker was Thumper, and Sanchez at the Park’s handball courts, F-Troop’s

“headquarters” and a place non-F-Troop gang members typically avoided. Sergeant testified a year before the shooting Lopez was driving a truck that contained CDs with F-Troop graffiti. From this evidence the jury could reasonably conclude Lopez was an active participant of F-Troop at the very least from January 2012 to February 2013.

Lopez makes much of McLeod’s testimony during cross-examination that he had not heard of Lopez or Thumper, his department did not have any records of him, he did not have any FI cards or STEP notices, he did not have any gang tattoos, he was older than your typical gang member at the time of his arrest, there was no evidence he was connected to F-Troop, and it was unclear whether he owned the gang indicia in January 2012. The jury heard this evidence, considered it, and ultimately rejected it. We cannot substitute our judgment for the jury’s judgment. (*Zamudio, supra*, 43 Cal.4th at pp. 357-358.)

We decline Lopez’s invitation to read into the active participant element a requirement “the circumstances of the offense cannot be the basis for this finding or form any part of it.” Lopez cites to no authority, and we found none, that supports his claim. His plain reading of “while” is unpersuasive. The word “while” has multiple definitions, one of which is “the time at which an event takes place.” (Webster’s Third New International Dictionary (1981) p. 2604.) Under this meaning, one could consider the facts of an event to determine whether one was an active participant in a criminal street gang.

To accept Lopez’s claim would undermine countless gang cases where courts have affirmed street terrorism convictions and gang special circumstances based on an expert’s opinion testimony concerning the facts of the underlying offense. In any event, and as we explain above, there was evidence Lopez was an active participant in F-Troop “immediately prior to the homicide” or “at the moment before the homicide” based on his apparel and his current and actual knowledge of the location of F-Troop’s gang gun. (*Garcia, supra*, 153 Cal.App.4th at p. 1509.) In his reply brief, Lopez states

that when they saw the three men “[he] decided to change his status from a passive and nominal gang participant to an active one.” Wasn’t this “immediately prior to the homicide” or “at the moment before the homicide”?

Lopez discusses a number of cases, including *Castenada, supra*, 23 Cal.4th 743, *People v. Martinez* (2008) 158 Cal.App.4th 1324 (*Martinez*), *Garcia, supra*, 153 Cal.App.4th 1499, and *In re Jose P.* (2003) 106 Cal.App.4th 458 (*Jose P.*),¹ where the courts concluded there was sufficient evidence to contend there was insufficient evidence here. When addressing sufficiency of the evidence claims, other cases are of limited relevance because each case necessarily depends on its own facts. (*People v. Thomas* (1992) 2 Cal.4th 489, 516.) In any event, those courts considered inter alia the circumstances of the offense to conclude the defendant was an active participant in a criminal street gang. (*Castenada, supra*, 23 Cal.4th at p. 753 [“through evidence of the crimes defendant here committed”]; *Martinez, supra*, 158 Cal.App.4th at p. 1331 [expert’s opinion based in part on crime defendant committed]; *Garcia, supra*, 153 Cal.App.4th at p. 1511 [sufficient evidence active participation in part based on commission of charged offense]; *Jose P., supra*, 106 Cal.App.4th at p. 468 [sufficient evidence active participation in part based on commission of charged offense].)

Based on the record before us, sufficient evidence supported the jury’s determination Lopez was an active participant in F-Troop pursuant to section 190.2, subdivision (a)(22), and section 186.22, subdivision (a). Thus, there was sufficient evidence supporting the special circumstance and count 2 under both the federal and state constitutional due process clauses. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Johnson* (1980) 26 Cal.3d 557, 576-577.)

¹ *Jose P., supra*, 106 Cal.App.4th 458, was disapproved on other grounds in *People v. Prunty* (2015) 62 Cal.4th 59, 78, footnote 5.

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

THOMPSON, J.